No. 24-1869

United States Court of Appeals for the First Circuit

KEVIN BROWN, et al.,
Plaintiffs-Appellees,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORP., et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the District of New Hampshire, No. 1:16-cv-00242 (Hon. Joseph N. Laplante)

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the American Association for Justice certifies that it is a non-profit organization. It has no parent corporation or publicly owned corporation that owns 10% or more of its stock.

Dated: March 10, 2025

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, and consumer cases, including class actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse when they have been harmed.

AAJ files this brief to urge this Court to affirm the class certification decisions below. AAJ members have vast experience with class actions brought on behalf of consumers and homeowners like those certified as classes in this case. Without the availability of the class device, many injured parties will receive no relief because the expense of proving an individual case renders the lawsuit economically problematic, or because the time it would take to get through repetitive trials effectively shuts the courthouse door. Issue classes can prove a valuable means of

[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or in part. Apart from the *amicus curiae*, no person, party, or party's counsel contributed money intended to fund the brief 's preparation and submission.

obtaining a disposition effectively for both parties. AAJ and its members who litigate these cases can provide a unique perspective that should be helpful to the Court.

SUMMARY OF ARGUMENT AND INTRODUCTION

Appellant Saint-Gobain Performance Plastics, Inc. contends that individual issues preclude certification of what it calls a "massive 'class as to liability issues,'" and instead favors separate trials for more than "10,000 properties" representing "tens of thousands of current and former owners." Saint-Gobain Opening Br. [hereinafter, "Saint-Gobain Br."] 1, 2, 3. Appellant, along with its *amici*, claim that Rule 23's "text, structure, history, and caselaw," should block its use permitting the establishment of the type of issues class adopted by the district court. *Id.* at 2, 15; Product Liability Advisory Council & National Association of Manufacturers *Amici Curiae* Br. [hereinafter, "PLAC Br."] 6 (referencing the "framework, text, and history of Rule 23"). Yet, thorough examination of the relevant text, structure, history, and caselaw yields the opposite results—as sister circuits have repeatedly held.

To reach its own conclusions, Saint-Gobain entirely eschews the same history it asserts is so enlightening and instead champions the position of a single circuit, based on a footnote in a decision that conflicts with U.S. Supreme Court precedent. Meanwhile, the historical tour provided by its supporting *amici* is limited and skewed. In contrast, the district court's careful and thoughtful opinion provides a

valid roadmap to the proper application of the class-action rule thar is in tune with the majority of circuits. The assiduousness with which the district court undertook its task is evident from its decisions to reject certification of the public nuisance claims and damages for class-action treatment because of the much greater need for individualized proof for those elements. The district court's well-considered approach merits affirmance by this Court.

While courts have expressed some caution in using issue classes, they have not created the types of categorical rules Saint-Gobain apparently favors. Instead, the circuits have readily authorized issue classes within Rule 23(b)(3) to prevent repetitive litigation over the same issues with the potential that different trials will reach different results on the basis of the same underlying facts. Because Rule 23 reflects a practical approach to resolving common issues among a plaintiff class and that practicality forms an apt description of the district court's handiwork, this Court should affirm the certification decision made below.

ARGUMENT

I. THE HISTORY AND TEXT OF RULE 23 SUPPORT THE APPROACH TO CERTIFICATION ADOPTED BY THE DISTRICT COURT.

A. History Provides Important Guidance in Construing Rule 23 and Advances Practical Considerations That Support Affirmance.

Saint-Gobain and its *amici* claim to derive support for their views from Rule 23's "text, structure, history, and caselaw." Saint-Gobain Br. 2, 15; PLAC Br. 6. Yet,

Saint-Gobain expends no real effort to provide this Court with any history, and its *amici* provide a selective and limited rendition of it. Even so, the history and development of representative class actions demonstrate the practical considerations that are a necessary part of the Rule 23 certification analysis. It is important to consider that history because Rule 23 "stems from equity practice" that predated its drafting. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). The Supreme Court has said that "in determining its meaning we have previously looked to the historical models on which the Rule was based." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841–845 (1999)). AAJ commends that history to this Court.

The problem of multiple persons suffering a common injury and seeking relief together through the courts predates Rule 23 by centuries. In fact, "representative suits have been recognized in various forms since the earliest days of English law." *Ortiz*, 527 U.S. at 832. The modern approach to class actions grew out of the same practical considerations that first motivated the precursors of today's class actions.

Early on, the law required that litigants join certain parties as necessary to achieve complete justice, provide appropriate relief, prevent a wasteful proliferation of lawsuits over the same essential facts, and reach a resolution inclusive of all to effect relief. Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1858–59 (1998) (citing cases in

footnotes dating back to 1673). When practicality prevented joining "necessary" parties because of their high numbers, or to overcome administrative difficulties of managing an action with hundreds of parties, courts devised a mechanism called a "bill of peace" that included absentee members as represented by those present in the case. *Id.* at 1859–62. *See also* 1 William Rubenstein, Alba Conte, & Herbert B. Newberg, Newberg and Rubenstein on Class Actions § 1:12 (6th ed. 2022).

A bill of peace prevented "multiple suits over a common question by bringing all the disputants into one suit." Hazard et al., *supra*, at 1862. *See also* Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297, 1297 (1932) ("Questions of law or fact which would otherwise be tried over and over can by this means be determined once for all in a single proceeding."). Bills of peace were in essence "'common question' class suits, which today we classify as the '(b)(3)' type of suit," combined to prevent the "burden of repetitive litigation." Hazard et al., *supra*, at 1862 (footnote omitted). Decisions binding absentees to their disposition were issued by the late seventeenth century. *Id.* at 1863. Once England merged law and equity in 1873, class actions for damages—and not just an accounting, declaration, or injunction—began. 1 Newberg and Rubenstein on Class Actions § 1:12.

Thus, the Eighth Circuit recognized that the "class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so

that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs." *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948); *see generally* Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987).

English experimentation with representative parties was carried over to these shores. Justice Story explained the wisdom of the approach behind this "general rule in equity" when he wrote:

> [A]ll persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be. The reason is that the court may be enabled to make a complete decree between the parties, may prevent future litigation by taking away the necessity of a multiplicity of suits, and may make it perfectly certain, that no injustice shall be done, either to the parties before the court, or to others, who are interested by a decree.

West v. Randall, 29 F. Cas. 718, 721 (C.C.D.R.I. 1820) (Story, J.). The practice was codified in Federal Equity Rule 48 (1842). 1 Newberg and Rubenstein on Class Actions § 1:13. While the rule's language seemed to suggest that absent parties could not be bound, the Supreme Court applied Story's principle without mentioning the rule when it allowed a representative suit by a class of preachers seeking a declaration of the rights for regional sections of the church to funds held centrally by the Methodist Episcopal Church of the United States. *Smith v. Swormstedt*, 57

U.S. (16 How.) 288 (1853). It held that "the decree binds all of them the same as if all were before the court." *Id.* at 303. The successor rule, Federal Equity Rule 38 (1912), made clear that absent parties were bound by any disposition obtained by a representative member.

With the advent of the rules of civil procedure and the joinder of law and equity in the United States, Rule 23 codified Equity Rule 38 and another rule in 1938 consistent with their interpretation. 1 Newberg and Rubenstein on Class Actions § 1:14. The 1966 iteration of rule 23 sought to "describe[] in more practical terms the occasions for maintaining class actions." Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment, 39 F.R.D. 69, 99 (1966). The principal purposes of the rule were to encourage "efficiency and economy." *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974). Rule 23(b)(3) authorized "those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." 39 F.R.D. at 102−03.

The 1966 Advisory Committee gave an example of a qualifying (b)(3) class in the form of a common fraud perpetuated against numerous persons for liability "despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class." 39 F.R.D. at 103. The Committee recognized that a "'mass accident' resulting in injuries to numerous persons is

ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways." *Id.* (emphasis added). Still, the Advisory Committee's note implicitly recognizes that the viability of a class where liability and defenses are not individualized, just as is the circumstances here, where the district court recognized differences between, for example, claims for trespass and negligence and claims for nuisance. *Brown v. Saint-Gobain Performance Plastics*, No. 16-CV-242-JL, 2023 WL 9023158, at *1 (D.N.H. Dec. 29, 2023). The Advisory Committee's notes are worth considering, as sister circuits have done, finding support for the combined application of Rule 23(b)(3) with Rule 23(c)(4). *See infra* pp. 21, 23. Of additional weight is the fact that the Advisory Committee notes are regarded as "a reliable source of insight into the meaning of a rule." *Hall v. Hall*, 584 U.S. 59, 75 (2018) (cleaned up).

This historical record and the approach taken by the district court here is consistent with class actions as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). Relief on a classwide basis is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." *Id.* at 701. In those cases, "the class-action device saves the resources

of both the courts and the parties by permitting *an issue* potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Id.* (emphasis added); *cf. Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351 (1983) (explaining that Rule 23 was designed to avoid the "needless multiplicity of actions").

History and purpose, then, support the use of Rule 23(b)(3) in this case, as the district court concluded.

B. Rule 23's Text Also Supports Affirmance.

Rule 23(b)(3) authorizes class actions where common issues predominate over individualized issues and class treatment is superior to other methods of adjudication. In addition to the standard requirements of Rule 23(a), certification of a (b)(3) class requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The rule provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues," and "[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under this rule." Fed. R. Civ. P. 23(c)(4), (c)(5). Those issues are identified first, as the text makes plain, and then the other forms of class actions identified by Rule 23 applied. Fed. R. Civ. P. 23(c)(4).

The Supreme Court has instructed that, "[b]y its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

At issue in the district court were three parts of Rule 23(b)(3)'s requirements: commonality, predominance, and superiority. *Brown*, 2023 WL 9023158, at *10. Each is readily met by the certified class here.

1. The certified class meets the requirement of commonality.

The district court identified the common issues susceptible to resolution on a class-wide basis and capable of advancing the litigation as "the release of PFOA and subsequent warnings and mitigation efforts; the geographical scope of contamination from Saint-Gobain's emissions; and the toxic nature of PFOA." *Brown*, 2023 WL 9023158, at *11. Doing so was consistent with this Court's recognition that a court may certify predominant common issues "even though individual issues were present in one or more affirmative defenses." *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003); *cf. Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) ("As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3)."); *Nightingale v. Nat'l Grid USA Serv. Co.,*

Inc., 107 F.4th 1, 11 (1st Cir. 2024) (rejecting a district court analysis that would require each class member to demonstrate a substantial and unreasonable privacy violation in order to be certified).

Saint-Gobain does not deny those common elements, but argues that "factual variation regarding any economic injuries" overrides the common facts and destroys classwide commonality. Saint-Gobain Br. 56. Saint-Gobain's position would limit (b)(3) classes to liability-and-damages classes and not permit liability-only classes, which the district court certified here. Rule 23 contains no text that would prohibit liability-only classes. Saint-Gobain's spin does not flow from the requirement that the commonality means that class members "have suffered the same injury," derived by "common contention[s]," and "generat[ing] common answers apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (citations omitted). Answering questions of liability satisfies those metrics without determining the degree of damages each class member suffered.

Saint-Gobain nonetheless insists that individualized proof of injury is a necessary component of any certified class. Yet, to state its position is to refute it. If class representatives must demonstrate that every putative class member was injured to a similar degree, the class-action mechanism would serve no purpose at all for it would require at the pretrial stage all the same proof that would be required of individual trials.

The Supreme Court provides significant guidance on this issue. For one thing, its decision in *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011), made clear that plaintiffs need not prove the defendant's deceptive conduct caused their claimed economic loss in a private securities fraud action in order to obtain class certification. *Id.* at 807. The decision, based on the Court's reading of Rule 23(b)(3), did not require as comprehensive a level of proof for certification as Saint-Gobain advocates.

More recently, the Court explained that individual issues are those where "'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (quoting 2 William B. Rubenstein, Newberg and Rubenstein on Class Actions § 4:50 (5th ed. 2012)). Under this approach, "[w]hen 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) *even though other important matters will have to be tried separately*, such as damages or some affirmative defenses peculiar to some individual class members." *Id.* (quoting 7AA Charles Alan Wright, Arthur R. Miller & Martin J. Kane, Federal Practice and Procedure § 1778 (3d ed. 2005)) (emphasis added).

Tyson Foods recognized that damages can be tried separately, thus allowing liability-only classes to go forward and further demonstrates that a "common injury" is not the equivalent of common damages. *See also* 1 McLaughlin on Class Actions § 4:43 (21st ed. 2024) (calling liability-only classes the "most commonly requested issue certification" under Rule 23(c)(4) and leaving "damages to individual class members be determined at follow-on trials or other proceedings").

Because the district court here committed no legal error and no abuse of discretion, great deference is owed the district court on its finding of commonality. *Dukes*, 564 U.S. at 369.

2. The certified class meets the requirement of predominance.

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods*., 521 U.S. at 623. The Supreme Court has also recognized that often "a representative sample is 'the only practicable means to collect and present relevant data' establishing a defendant's liability." *Tyson Foods*, 577 U.S. at 455 (quoting Manual of Complex Litigation § 11.493 (4th ed. 2004)).

The *Tyson Foods* Court further discussed the use of representative evidence by explaining with approval the approach it took in *Anderson v. Mt. Clemens*, 328 U.S. 680 (1946). 577 U.S. at 456. The case concerned uncompensated time for workers while they walked to and from their workstations. The time could vary by

as much as ten minutes per employee. However, the defendants' violation of a statutory duty to record that time opened the door to using representative evidence because the remedial nature of the underlying statutory basis for the lawsuit, as well as the public policy it embodied, "militate[d] against making" the burden of proving uncompensated work "an impossible hurdle for the employee." *Id.* at 687, *quoted in Tyson Foods*, 577 U.S. at 456. Notably, the approach articulated in *Anderson* and endorsed in *Tyson Foods* emphasizes the same type of practical considerations that this brief's history section discussed and were essential to bringing class actions into being.

Similar considerations to those adopted in *Anderson* allow the plaintiff class here to rely on representative evidence, which exists not only through the expert evidence it mustered, but also via the studies undertaken by Saint-Gobain and commissioned by the New Hampshire Department of Environmental Services (NHDES). On the basis of its findings, NHDES ordered remedial measures—including the provision of bottled water to the geographic area represented by the plaintiff class—and obtained a subsequent consent decree in which Saint-Gobain agreed to pay for alternative water sources for the contaminated properties. *Brown*, 2023 WL 9023158, at *3. As in *Anderson*, both statutory law and strong public policy support the use of representative evidence. Individualized proof serves little purpose here.

3. The certified class meets the requirement of superiority.

A class action is plainly superior to remitting 10,000 or more class members to individual actions, as Saint-Gobain advocates. Yet that is the alternative that this court must consider. 7AA Federal Practice & Procedure § 1779. The median time from filing to disposition of a civil case in the U.S. District Court for the District of New Hampshire is 44.4 months, and over 48 percent of pending civil cases (a total of 630 cases) in that court are more than three years old. Administrative Office of the U.S. Courts, Judicial Caseload Profile: New Hampshire, *in* U.S. District Courts–Combined Civil and Criminal Federal Court Management Statistics 5 (Dec. 31, 2024), https://www.uscourts.gov/sites/default/files/2025-02/fcms_na_distprofile1231.2024.pdf. Just a cursory reading of those statistics demonstrates the unlikelihood that individual trials, whether in that court alone or spread between that court and, presumably, the New Hampshire state courts could possibly meet the civil rules' mandate "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. At the current 44.4-month disposition rate, 10,000 individualized cases would take 37,000 years to litigate. Thus, as a practical matter, no realistic alternative to the class-action mechanism exists here.

Saint-Gobain suggests that certifying some issues for class certification would not save time or resources because, even if permitted to proceed as a class action, individual trials on the public nuisance claims and damages will still need to proceed,

regardless of who prevails in the class action. Saint-Gobain Br. 58. The argument, however, fails to reflect the reality of modern litigation.

Just as the Supreme Court noted with respect to issue preclusion, courts encourage parties to narrow issues for trial and, in so doing, "protect[] their adversaries from the expense and vexation of attending multiple lawsuits, conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153–54 (1979). Proceeding with the class action will, at a minimum, usefully narrow the issues. Moreover, there would be no unconstitutional reexamination of factual determinations made by the first jury, as Saint-Gobain contends, because any relevant findings would carry over to the second jury under issue preclusion doctrines. *See Follo v. Morency*, 507 B.R. 421, 427 (D. Mass. 2014) (examining the teachings of the Restatement (Second) of Judgments § 13 cmt. g (Am. L. Inst. 1982)); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

Still, the prior decision may well do more than narrow the issues. It is a truism that "[m]ost cases settle, and this is as it should be." *DeLaventura v. Columbia Acorn Tr.*, 417 F. Supp. 2d 147, 150 (D. Mass. 2006). In fact, "settlement is the most frequent disposition of civil cases in the United States." Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1339 (1994).

If the class action results in a finding of either liability or nonliability, there is a strong likelihood that settlement discussions will occur that eliminate *any* need for individual trials. *See* J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. Rev. 59, 60 (2016) (calling it "extremely likely" that settlement will occur once the parties "largely agree on the likely outcome of a trial"); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1, 17 (1984) ("Where either the plaintiff or defendant has a 'powerful' case, settlement is more likely because the parties are less likely to disagree about the outcome.").

Even if no settlement occurs, class-based damage-only litigation will likely occur and require far less litigation time and effort than would otherwise be required.

If the class action fails, no damages trials will take place, and the only question remaining then becomes whether individual public-nuisance trials will remain worth pursuing in light of the failure of the other causes of action and their issue preclusive effects. In any event, the class adjudication will have advanced the final disposition of these claims.

Should the prospect of settlement be considered at this stage? The Supreme Court has suggested it should. *Amchem Prods.*, 521 U.S. at 619 ("[S]ettlement is relevant to a class certification.").

The upshot is that the practicalities strongly support giving no weight to the possibility of a massive number of individual trials once the class issues are resolved because the information from the class action (and, perhaps, at most a few bellwether trials) will likely lead to settlement or cessation of the matter.

4. Further practical considerations also support certification.

Because the class procedure grew out of practical necessity and those real-world considerations have shaped its adjustments over time, it should also support the district court's ruling. After all, district courts have broad discretion in determining whether or not to certify a class action. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 17 (1st Cir. 2015); *see also Yamasaki*, 442 U.S. at 703 ("[M]ost issues arising under Rule 23 . . . [are] committed in the first instance to the discretion of the district court.").

Moreover, as was discerned with respect to asbestos litigation—and is true of the district court's plan here—the judge's "plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with, as that experienced judge says, 'days of the same witnesses, exhibits and issues from trial to trial.'" *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986). *Jenkins* further observed that "courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters." *Id.* at 474. What was true then is even more the case now.

II. THE MAJORITY OF CIRCUIT DECISIONS HAVE REJECTED SAINT-GOBAIN'S ARGUMENT THAT RULE 23(c)(4) HAS NO APPLICATION TO (b)(3) CLASSES.

Saint-Gobain assigns as error the district court's use of Rule 23(c)(4), which authorizes the use of issue classes, with respect to a Rule 23(b)(3) class. A very recent analysis of the issue comes from the Seventh Circuit. *Jacks v. DirectSat USA, LLC*, 118 F.4th 888 (7th Cir. 2024). The court surveyed its sister circuits and found that the Fifth Circuit stood alone in endorsing the view advanced by Saint-Gobain, adhering to a position it took in *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), an early piece of tobacco litigation that decertified a class largely because the certification decision failed to account for how variations between the laws of different states for purposes of predominance and superiority. In the course of the decision, a footnote scolded the district court for "manufactur[ng] predominance through the nimble use of subdivision (c)(4)." *Id.* at 745 n.21. It added that "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Id.* Any other view, it said, "would eviscerate the predominance requirement of rule 23(b)(3)." *Id.*

Citing *Castano*, the Fifth Circuit subsequently refused to permit a liability-only class through Rule 23(c)(4) because it would have cleaved off "the very issue that defeats predominance under Rule 23(b)(3)—i.e., the assessment of injury and

the calculation of damages." *Corley v. Orangefield Indep. Sch. Dist.*, 152 F. App'x 350, 355–56 (5th Cir. 2005) (per curiam). However, this newer, unreported decision predates more recent Supreme Court cases that indicate that damages may be tried separately. *See, e.g.*, *Tyson Foods*, 564 U.S. at 350; *see also* 1 McLaughlin on Class Actions § 4:43.

Thus, the Fifth Circuit decisions relied upon by Saint-Gobain should have no traction with this court.

The Seventh Circuit, in rejecting the Fifth Circuit's approach, noted that "the Second, Third, Fourth, Sixth, and Ninth Circuits permit certification under Rule 23(c)(4) so long as common questions predominate in resolving the individual issues to be certified." *Jacks*, 118 F.4th at 897.

The Second Circuit held that "a court may employ Rule 23(c)(4) when it is the 'only' way that a litigation retains its class character, *i.e.*, when common questions predominate only as to the 'particular issues' of which the provision speaks." *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006) (quoting 39 F.R.D. at 106). In its decision, it emphasized that "the plain language and structure of Rule 23" make clear that a court must begin its certification consideration by identifying "the issues potentially appropriate for certification 'and . . . then' apply the other provisions of the rule." *Id.* (quoting Fed. R. Civ. P. 23(c)(4)).

That reading comports with rules of construction, such that a rule of civil procedure should be interpreted using the same tools that are utilized in construing a statute. The Supreme Court promulgates the Federal Rules of Civil Procedure under the authority of the Rules Enabling Act, subject to review by Congress. *Shady Grove*, 559 U.S. at 406–07 (citing 28 U.S.C. § 2072(a)). Just as with a statute, a rule is to be read and construed "according to its plain meaning." *Triantos v. Guaetta & Benson, LLC*, 91 F.4th 556, 564 (1st Cir. 2024); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 391 (1990). Accordingly, the Second Circuit's reading emanates from the Rule's language providing that "a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall *then* be construed and applied accordingly." Fed. R. Civ. P. 23(c)(4) (emphasis added).

If further support were needed, the Second Circuit looked to the authoritative Advisory Committee notes, which advise with respect to subsection (c)(4), that an action "may retain its 'class' character only through the adjudication of liability to the class," while "members of the class may thereafter be required to come in individually and prove the amounts of their respective claims." *In re Nassau Cnty.*, 461 F.3d at 226 (quoting 39 F.R.D. at 106).

That court also noted that leading "commentators agree that courts may use subsection (c)(4) to single out issues for class treatment when the action as a whole

does not satisfy Rule 23(b)(3). *Id.* at 227. In support, it cites 7AA Federal Practice & Procedure § 1790 (stating that subsection (c)(4) "best may be used to designate appropriate classes or class issues at the certification stage" so that "the court can determine whether, as so designated, the other Rule 23 requirements are satisfied") and 6 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 18:7 (4th ed. 2002) ("Even cases which might not satisfy the predominance test when the case is viewed as a whole may sometimes be certified as a class limited to selected issues that are common, under the authority of Rule 23(c)(4).").

The Third Circuit joined the "majority of the courts of appeals" in reading the different subsections of Rule 23 to produce the result that the Second Circuit did. *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259, 273 (3d Cir. 2021). The Fourth Circuit agrees, advising courts within the circuit to "take full advantage" of separate issue classes "provided that 'each subclass must independently meet all the requirements of (a) and at least one of the categories specified in (b).'" *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 441 (4th Cir. 2003) (citation omitted). *See also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (representing the Ninth Circuit's agreement).

The Sixth Circuit agreed with the majority that this approach "flows naturally from Rule 23's text, which provides for issue classing '[w]hen appropriate,'" and from the Advisory Committee's endorsement of that view and its refusal to "alter the

language of Rule 23(c)(4) to reflect the narrow view or otherwise limit the use of issue classes." *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 413 (6th Cir. 2018) (citing Rule 23 Subcommittee Report, *in* Advisory Committee on Civil Rules Agenda Book 90–91 (2015), https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf).

That survey convinced the Seventh Circuit to join the majority of circuits. It held that its decision arose from reading the rule's text and Advisory Committee notes, *Jacks*, 118 F.4th at 897–98, and affirmed that "following the Fifth Circuit's approach would render Rule 23(c)(4) superfluous, something we try strenuously to avoid." *Id.* at 898. It further noted that the Fifth Circuit erred in "treating Rule 23(c)(4) as merely a 'housekeeping rule that allows [a court] to sever the common issues for a class trial' after it has determined that the requirements of Rule 23(b)(3) have been satisfied as to the entire cause of action." *Id.* (quoting *Castano*, 84 F.3d at 745 n.21). Finally, the Seventh Circuit survey placed the D.C. Circuit in a middle ground, allowing certified issues under certain conditions. *Id.* (citing *Harris v. Med. Transp. Mgmt., Inc.*, 77 F.4th 746, 760–61 (D.C. Cir. 2023)).

The bottom line is that Saint-Gobain asks this Court to adopt the views expressed by a *single* circuit, in a footnote, that is contrary to the overwhelming majority of circuits to address the issue. The age of the decision rendered in 1996, which no other circuit followed during the passage of all this time, would be reason

enough to reject its view. However, the solid reasoning of the circuits that hold to the contrary—examining text and the Advisory Committee's strong views—provides ample reason by itself to affirm the district court and join with the other circuits in their holdings.

Yet another reason is the Fifth Circuit's inconsistency with more recent U.S. Supreme Court holdings, approving separate trials for damage classes, which was the essence of the Fifth Circuit's concern in *Corley* (the more recent decision to apply *Castano's* approach). In fact, the Third Circuit looked at the Fifth Circuit cases and expressed doubt about the continued viability of *Castano*, even within that jurisdiction, because "subsequent caselaw from the Fifth Circuit suggests that any potency the narrow view once held has dwindled." *Russell*, 15 F.4th at 274.

This Court should join the better reasoning that the majority of circuits have expressed. Moreover, it should continue—as it has in the past—to be "[r]eluctant . . . to create a circuit split," *Rossiter v. Potter*, 357 F.3d 26, 27 (1st Cir. 2004), or deepen one where the decision that represents a split is nearly 30 years old and newer cases find it to be in error.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,797 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: March 10, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that on this 10th day of March, 2025, a true and correct copy of the foregoing was filed electronically with the Clerk's Office of the United States Court of Appeals for the First Circuit and served on all parties using the CM/ECF system.

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